Supreme Court, U. S.
FILED
JAN 31 1979
MICHAEL RODAK, JR., CLERK

No. 78-962

In the Supreme Court of the United States

OCTOBER TERM, 1978

THOMAS J. PURVIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 580 F.2d 853. The opinion of the district court (Pet. App. 14a-24a) is reported at 436 F. Supp. 770.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1978, and a petition for rehearing

was denied on November 15, 1978 (Pet. App. 29a). The petition for a writ of certiorari was filed on December 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the indictment in this case, which alleged that petitioners had conspired to injure, oppress, threaten, and intimidate citizens of the United States in the free exercise and enjoyment of a specified constitutional right, was adequate to charge a violation of 18 U.S.C. 241.

STATEMENT

An indictment returned on June 27, 1977, by a grand jury of the United States District Court for the Southern District of Alabama charged petitioners, nine officials of the Mobile County Sheriff's Department, with violating the federal civil rights statute, 18 U.S.C. 241, by conspiring "to injure, oppress, threaten and intimidate inmates of the Mobile County Jail * * * in the free exercise and enjoyment of the right and privilege secured to them by the Constitution and laws of the United States not to be deprived of life without due process of law, which conspiracy resulted in the death of Louis Wallace, an inmate at the Mobile County Jail" (Pet. App. 25a). The indictment alleged that "[i]t was part of the plan and purpose of the conspiracy that the conspirators would, without lawful authority, shoot from ambush one or more of the said inmates during a planned escape

attempt which was to occur through a hole dug in the wall of the Mobile County Jail, of which escape attempt the conspirators had prior knowledge" (*ibid.*).[1]

The district court dismissed the indictment on August 17, 1977, finding that it failed to charge that petitioners had conspired to accomplish the alleged ends "unlawfully, willfully and knowingly" or with an intent to deprive the inmates of due process (Pet. App. 14a-24a). The government appealed with respect to the conspiracy count, and the court of appeals reversed (*id.* at 1a-13a).

ARGUMENT

1. Petitioners challenge the court of appeals' reversal of the district court's dismissal of their indictment on the ground that it failed to allege adequately that petitioners intended to deprive the inmates of a constitutionally protected right. The decision of the court below places petitioners in the same position as if the district court had denied their motion to dismiss. That ruling could not have been challenged by a pretrial appeal (see *United States* v. *MacDonald*, 435 U.S. 850 (1978)), and the reasons of policy that counsel against permitting interlocutory appeals of such orders similarly weigh against action by this

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[1] The indictment also contained a substantive count charging that petitioner James Stanford, acting under color of law, "did wilfully shoot and kill Louis Wallace * * * and did thereby deprive [him] of the right * * * not to be deprived of life without due process of law," in violation of 18 U.S.C. 242 (Pet. App. 27a).

Court to undertake review of the adequacy of the indictment at this stage of the proceedings. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967). At trial petitioners may be acquitted, in which event their claims will be moot. If, on the other hand, any petitioners are convicted and their convictions are affirmed, they will then be able to present all of their contentions to this Court by seeking review of the final judgment.[2]

2. In any event, petitioners' claim that the indictment is insufficient to charge an offense under 18 U.S.C. 241 is insubstantial for the reasons stated by the court of appeals, upon whose opinion we rely. Contrary to petitioners' contention (Pet. 5-6, 11-12, 14) that the indictment, which tracks the statutory language,[3] merely alleges a conspiracy to kill Louis Wallace, thereby "functionally" depriving him of a

[2] Petitioners do not contend that the indictment fails to provide sufficient notice of the charges to allow them to prepare a defense.

[3] 18 U.S.C. 241 provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

constitutional right, the indictment explicitly alleges that the object of the conspiracy was to "injure, oppress, threaten and intimidate inmates of the Mobile County Jail * * * in the free exercise and enjoyment of the right and privilege secured to them by the Constitution and laws of the United States not to be deprived of life without due process of law * * *" (Pet. App. 25a). As the court of appeals noted (*id.* at 9a-10a, 13a), it was not essential that the indictment contain an additional phrase using the words "specific intent."

It is of course true that an indictment states an offense under Section 241 only if it alleges that the purpose of the conspiracy was to deprive citizens of a federally protected right and only if the right in question is specifically identified. See *United States* v. *Cruikshank*, 92 U.S. 542 (1875); *Wilkins* v. *United States*, 376 F.2d 552 (5th Cir.), cert. denied, 389 U.S. 964 (1967). This Court has had to determine on a number of occasions whether a particular indictment under this statute adequately identified the right in issue and whether that right could properly be characterized as federally protected. See, *e.g.*, *United States v. Cruikshank, supra;* compare *United States* v. *Williams*, 341 U.S. 70 (1951), with *United States* v. *Price*, 383 U.S. 787 (1966). The Court has never suggested, however, that an indictment under Section 241 that plainly alleged that the conspirators' object was to injure a victim in the exercise of a specific constitutional right was nonetheless defective for failure to include repetitive words of intent. Indeed, the indictment in this case is virtually identical to those

in *United States* v. *Price*, *supra*, 383 U.S. at 796, and *United States* v. *Guest*, 383 U.S. 745, 747 n.1 (1966).

"Conspiracy," the court of appeals correctly pointed out (Pet. App. 12a), "is the gravamen of the offense under 18 U.S.C.A. § 241." See *United States* v. *Guest*, *supra*, 383 U.S. at 753-754. That crime incorporates the elements of willfulness and specific intent. As the Court stated in *Frohwerk* v. *United States*, 249 U.S. 204, 209 (1919), "intent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to accomplish it." If the indictment here had alleged that petitioners "*willfully* conspired to deprive inmates of their civil rights *with intent to* deprive them of their civil rights," as petitioners apparently assert was necessary, the additional words would have contributed nothing.[4] Petitioners have

[4] The 1874 recodification of the civil rights statute reflects the view that such words are redundant. See Pet. App. 12a. The Act of May 31, 1870, ch. 114, 16 Stat. 141, read as follows:

> Sec. 6. * * * [I]f two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same * * *.

The 1874 version (the present 18 U.S.C. 241) omits the words "with intent" from the conspiracy section, since the words "conspiracy to injure, oppress, etc." already connote intent. The second provision, dealing with "going upon the public highways," retains the words "with intent," for the requisite intent is not implicit in that conduct.

cited no case decided by this Court or any court of appeals that suggests a contrary construction of the statute.[5] In sum, "[t]aken as a whole, the facts set forth in the indictment here sufficiently allege an intent by [petitioners] to deprive the inmates of their constitutional right to due process" (Pet. App. 9a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1979

[5] *Buchanan* v. *United States*, 233 F. 257 (8th Cir. 1916), alleged by petitioners to conflict with the decision below (Pet. 9), concerned the district court's refusal to admit certain evidence that was relevant to the defendant's intent, not the validity of the indictment. Here, as the court of appeals observed (Pet. App. 7a), there is no dispute that the government "must prove specific intent to deprive a citizen of constitutional rights to sustain a conviction under 18 U.S.C.A. § 241."

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